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# Bryan Jay Stephens v. Safeway Stores et al : Brief of Plaintiff-Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

\* \* \* \* \*

BRYAN JAY STEPHENS, :  
Plaintiff-Appellant, :  
vs. : Case No. 16203  
SAFEWAY STORES, ET AL, :  
Defendant-Respondents. :

BRIEF OF PLAINTIFF-APPELLANT

\* \* \* \* \*

STATEMENT OF THE NATURE OF THE CASE

Bryan Jay Stephens appeals from the Order of Dismissal With Prejudice for failure to prosecute pursuant to Rule 41(b) U.R.C.P.

DISPOSITION IN THE LOWER COURT

The case came on before the Court, Honorable G. Hal Taylor, Judge, presiding, on defendant's motion for dismissal. The parties argued the motion, and submitted affidavits and memoranda of legal authority in support of their respective positions. This appeal is brought from the final judgment of the Court wherein plaintiff's case was dismissed with prejudice pursuant to Rule 41(b) U.R.C.P. on November 24, 1978.

RELIEF SOUGHT ON APPEAL

Appellant Stephens seeks reversal of the judgment of the lower Court and an order remanding the case to the Third Judicial District Court for a trial on the merits.

### STATEMENT OF FACTS

This appeal seeks reversal of the order of the Third District Court dismissing plaintiff's lawsuit with prejudice pursuant to Rule 41(b) U.R.C.P. after defendant claimed plaintiff had failed to diligently prosecute the action. (R. 24-25) The matter was submitted to the Court on the file and record in the case, including the affidavits of counsel, memorandums of law, and on oral argument. (R. 21-23, 26-32)

The plaintiff originally sued these same defendants on July 28, 1971, in case no. 200474. That matter was dismissed without prejudice in June, 1972, at the request of plaintiff's counsel, shortly before trial was scheduled, and upon stipulation of defendants.

Plaintiff filed the instant case, through attorney Richard Day on November 13, 1972, claiming damages in excess of \$100,000 for personal injuries sustained as a result of an assault and battery allegedly committed by defendant Safeway Store employees and occurring on its premises. (R. 2-4)

The defendants filed a general denial in answer to the complaint, and served interrogatories therewith. (R. 5-10) Attorney Day then withdrew from the case on December 13, 1972, leaving plaintiff in the position of representing himself. (R. 12, 13)

Thereafter, during February, 1973, defendants sought to dismiss the complaint through motion to compel answers to interrogatories. (R. 14,15) Plaintiff appeared in person and was given an additional 10 days to answer, (R. 17) and then prepared and filed the requested answers as best he could. (R. 18-19) Plaintiff then employed his present counsel of record and entered his appearance on June 28, 1973.

The respective attorneys for the parties communicated regarding the various aspects of the case at various times during 1973. (R. 29, 31) No further proceedings directly involving the Court were brought by either party until the motion to dismiss which is the subject of this appeal was filed by defendant.

### ARGUMENT

WHERE PLAINTIFF SHOWED JUSTIFIABLE EXCUSE FOR DELAY IN SETTING CASE FOR TRIAL, IT WAS ABUSE OF DISCRETION FOR LOWER COURT TO DISMISS WITH PREJUDICE IN ABSENCE OF ANY FACTUAL SHOWING OF PREJUDICE TO DEFENDANT, AND WHERE SAID DISMISSAL RESULTED IN INJUSTICE TO PLAINTIFF

This Court has recently considered several Rule 41(b) cases which, it is submitted, are dispositive of the issue presently before this Court. The leading case, Utah Oil Co. v. Harris, 565 P.2d 1135 (1977) has set forth guidelines for determining justifiable excuse for delay. Accordingly, this Court must consider the following well-established principles:

1. Conduct of both parties.
2. The opportunity each has had to move the case forward.
3. What each of the parties have done to move the case forward.
4. What difficulty or prejudice may have been caused to the other side.
5. And, most important, whether injustice may result from the dismissal.

These principles are well-established in the following cases which were cited with approval in Utah Oil, supra: See Westinghouse Electric Supply Co. v. Paul W. Larsen Contractor, Inc., 544 P.2d 876 (1977);

Polk v. Ivers, 561 P.2d 1075 (1977); Johnson v. Firebrand, 571 P.2d 1369 (1977); Crystal Lime & Cement Co. v. Robbins, 538 P.2d 1323 (1975).

In Johnson v. Firebrand, supra, the action lay for four years without either party taking an active interest in the litigation, and although no reasons were given for the delay, the Court held that it was an abuse of discretion for the trial court to dismiss with prejudice on that ground alone.

In Westinghouse, supra, this Court reversed a dismissal with prejudice, and stated:

"It is indeed commendable to handle cases with dispatch and to move calendars with expedition in order to keep them up to date. But it is even more important to keep in mind that the very reason for the existence of courts is to afford disputants an opportunity to be heard and to do justice between them. In conformity with that principle the courts generally tend to favor granting relief from default judgments where there is any reasonable excuse, unless it will result in substantial prejudice or injustice to the adverse party."

In the federal courts in Rule 41(b) cases, it has been pointed out that dismissal is a very harsh remedy which should be used only in the most extreme situations.

In Flaska v. Little Marine Constr. Co. (1968, CA5 Fla.) 389 F.2d 885, cert den 392 U.S. 928, 20 L.Ed. 2d 1387, 88 S. Ct. 2287, the Court pointed out that dismissal is too harsh a remedy except in extreme situations where there is a clear record of delay or contumacious conduct by plaintiff, and further stated that the court should first resort to the wide range of lesser sanctions which keep litigation moving, but without depriving the litigant of his day in court.

The allegations that plaintiff refused to answer interrogatories may be readily explained on the basis of the fact that defendant knew that plaintiff was not represented by counsel at that time, and that defendants were seeking to take advantage of plaintiff while plaintiff was acting as his own attorney.

In applying the principles and guidelines established in this jurisdiction, it is obvious that great injustice will be done to plaintiff by dismissing his meritorious claim. It is clear that he has a good cause of action against defendants based upon the unprovoked assault and battery, during which he sustained severe and permanent injuries, and further for the malicious and unwarranted subsequent prosecution of plaintiff for abusive language wherein plaintiff was acquitted.

It is fundamental to our system of justice that an injured plaintiff be given his day in court, and that he should not be, in effect, defaulted, for technical procedural reasons.

It is not disputed that the defendant has had more than an equal opportunity to get this case ready for trial. Although defendant claims to have been thoroughly prepared for trial of the first case in 1972, there is nothing to indicate that defendant took any action to move the case along subsequent to 1973, although they had every opportunity to so do. It would appear that defendants had no particular urgency in moving the case forward, although they admit that their discovery was



complete, their witnesses have been interviewed, and are available, and that they have taken the plaintiff's deposition.

There have been no facts submitted by defendants which would indicate that the existing delay in a trial date has prejudiced their case in any way. Their witnesses are persons who reside and work in the local area. It is believed by plaintiff that these are mainly store employees, including off-duty law enforcement officers, and that most are still available. Much of the testimony which could be elicited from such witnesses will be cumulative. Plaintiff believes that those witnesses are only relevant as to the liability issues. It is submitted that there would be little or no difficulty for defendant to proceed to a trial on the merits without prejudice due to any delay.

Plaintiff, through counsel, states to this Court the belief that there has been diligent preparation on this case, and that any delay has not been unreasonable, in view of the fact that this action involves claim for personal injuries, and respectfully points out that there has been activity in seeking out competent medical examination and treatment for plaintiff's injuries.

Plaintiff was seeking to ascertain the necessity for future medical attention. Even at the present time, plaintiff suffers from headaches, dental problems, and neurological disorders caused by the brutal beating he received at the defendants' hands. Plaintiff has been disabled by his injuries and has had difficulty in finding employment, and in carrying out the normal functions of his life.

It is submitted that it was not an unreasonable delay to not set the matter on for trial prior to ascertaining the true nature and extent of plaintiff's injuries, including the question regarding the extent of long-term permanent damage. The uncertainty regarding plaintiff's condition had a great deal to do with the length of time which was allowed to transpire.

During 1973, plaintiff's counsel had conversations and otherwise communicated with defense counsel about this case. He is of the opinion that defendants expressed no particular urgency in getting this case to trial. On the contrary, the possibility of a negotiated settlement was definitely considered, and plaintiff's counsel was left with the understanding that these negotiations would continue as additional medical information and facts concerning the injuries could be developed. Defendants' attorneys have made no attempt to contact plaintiff's counsel for several years after the last of these discussions.

It is submitted that it would be unjust and unfair to allow the dismissal to stand uncorrected and unreversed by this court. The defendant has suffered no prejudice in going forward with their defense, while the plaintiff has suffered great injustice. The opinions of this court, and the better reasoning and principle of the law requires that to avoid injustice, this matter must be reversed and remanded for disposition on the merits.

#### CONCLUSION

Plaintiff respectfully submits that the decision of the Third District Court is erroneous and constitutes an abuse of discretion which requires reversal and remand for a trial on the merits.

Dated: April 6, 1979

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing Brief of Plaintiff-Appellant were served upon Defendant-Respondent by placing said copies, postage prepaid, in the U.S. Mail and addressed to J. Steven Newton, Attorney at Law, 136 South Main Street, Suite 404 Kearns Building, Salt Lake City, Utah this \_\_\_ day of April, 1979.

